STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of AUSTIN BRADY and PARKER BRADY, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

GLENNDA SWANSON,

Respondent-Appellant,

and

KEVIN BRADY,

Respondent.

UNPUBLISHED
July 17, 2003

No. 246193
Marquette Circuit Court
Family Division
LC No. 01-007371-NA

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FAMILY INDEPENDENCE AGENCY,

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Before: Neff, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Respondents, Glennda Swanson and Kevin Brady, appeal as of right from the trial court's order terminating their parental rights to the minor children under MCL 712A.19b(3)(b) and (j).[1] We affirm.

I

Respondents argue that the trial court impermissibly shifted the burden of proof to them to prove that §§ 19b(3)(b) and (j) were not established.[2] Respondents rely on some remarks made by the court after the adjudicative trial as support for this claim. We conclude that this issue is not preserved because it was never presented to the trial court before the subsequent dispositional hearing, which was held to determine whether respondents' parental rights should be terminated. An appellant "may not harbor error as an appellate parachute." *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Even if we were to review this issue for plain error, we would not reverse. Cf. *In re Snyder*, 223 Mich App 85, 92; 566 NW2d 18 (1997); see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A judge is presumed to know and follow the law absent proof to the contrary. *People v Garfield*, 166 Mich App 66, 79; 420 NW2d 124 (1988); *People v Farmer*, 30 Mich App 707, 711; 186 NW2d 779 (1971). The law with regard to the burden of proof generally involves two concepts, the burden of going forward with evidence and the burden of persuasion:

> Generally the burden of persuasion is allocated between the parties on the basis of the pleadings. The party alleging a fact to be true should suffer the consequences of a failure to prove the truth of that allegation. A plaintiff has the burden of proof (risk of nonpersuasion) for all elements necessary to establish the case. This burden never shifts during trial. . . .
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> Initially, the burden of going forward with evidence (the risk of nonproduction) is upon the party charged with the burden of persuasion. However, the burden of going forward may be shifted to the opposing party. [*Kar v Hogan*, 399 Mich 529, 539-540; 251 NW2d 77 (1976).]

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[1] It is apparent that an isolated reference in the trial court's opinion to § 19b(3)(i) is a clerical error. That subsection is not factually applicable and, considered as a whole, the trial court's opinion reflects that, in addition to § 19b(3)(b), the court substantively relied on § 19b(3)(j), not § 19b(3)(i). Hence, it unnecessary to consider respondent Brady's arguments directed at § 19b(3)(i).

[2] Although this issue is substantively raised by respondent Swanson, respondent Brady announces in his brief on appeal that he is adopting respondent Swanson's arguments with regard to this issue.

In this case, termination of respondents' parental rights was requested at the initial dispositional hearing. There can be no dispositional hearing without an adjudication. *In re AMB*, 248 Mich App 144, 177; 640 NW2d 262 (2001). The adjudication determines whether a child comes within the court's jurisdiction. *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993). The dispositional hearing determines what action, if any, will be taken on behalf of a child. *Id.* at 108. Termination may not be sought at the initial dispositional hearing unless a petition requesting termination of parental rights has been filed. MCL 712A.19b(4). The petitioner bears the burden of proof on this issue. MCR 5.974(A)(3).[3]

When termination of parental rights is requested at the initial dispositional hearing, the trial court's determination whether a statutory ground for termination exists under MCL 712A.19b(3) must be based on legally admissible evidence introduced at the adjudicative trial. MCR 5.974(D)(3)(c). If the court concludes that a statutory ground for termination has been established, it must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000). Although the primary beneficiary of the best-interest provision is the child, the best-interest provision also affords a respondent an opportunity to avoid termination, despite the establishment of a statutory ground for termination. *Id.* at 356.

Examined against this backdrop, and in the context of the procedural posture of this case at the time the trial court made its challenged remarks after the adjudicative trial, we are persuaded that the trial court did not improperly shift the burden of proof. Rather, the trial court's remarks reflect its view that the evidence at the adjudicative trial was sufficient to enable it to find a statutory ground for termination, and that one or both respondents were not truthful when they denied at the adjudicative trial having any knowledge of how their younger son was injured. At most, the trial court went beyond MCR 5.974(D)(3)(c) by indicating that it was willing to consider additional evidence about how respondents' child was injured, and took the additional step of informing respondents about the gravity of the evidence and its potential impact on their parental rights. The record does not support a characterization of the court's comments as an indication that the burden of proof was improperly shifted to respondents. Indeed, a review of the trial court's subsequent opinion terminating respondents' parental rights also fails to disclose that the burden of proof was improperly shifted. Accordingly, this claim affords no basis for relief.

II

Both respondents argue that the trial court erred by denying their request to have a jury decide whether their parental rights should be terminated. We conclude that the trial court correctly determined that respondents did not have either a statutory or constitutional right to a jury trial. MCL 712A.17(2) does not confer a right to a jury determination of a petition to terminate parental rights. Examined in context, the term "hearing," as used in MCL 712A.17,

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[3] The court rules governing child protective proceedings were amended and recodified as part of new MCR subchapter 3.900, effective May 1, 2003. This opinion refers to the rules in effect at the time of the trial court's decision.

plainly refers to a hearing to determine whether a child is within the court's jurisdiction. Indeed, such a construction is in accord with longstanding precedent recognizing that the statutory scheme authorizes a jury trial only at the adjudicative phase of a child protection proceeding. *In re Miller*, 178 Mich App 684, 686; 445 NW2d 168 (1989); *In the Matter of Oakes*, 53 Mich App 629, 631-632; 220 NW2d 188 (1974); *In re Brock, supra*. Thus, the trial court properly determined that MCL 712A.17 does not afford a right to a jury trial on a request to terminate parental rights.

We similarly reject respondents' claim that the Due Process Clause affords them a right to a jury trial. *In re Brock, supra* at 111.

III

Next, we consider respondents' challenges concerning the trial court's determination that a statutory ground for termination was established with respect to their younger son, Parker. Respondent Swanson correctly recognizes that the trial court relied on both § 19b(3)(b) and § 19b(3)(j) as bases for its decision. Although respondent Brady does not address § 19b(3)(j), having considered the arguments of both respondents, we find no basis for disturbing the trial court's determination that both statutory grounds were proven.

The evidence established that Parker sustained multiple episodes of trauma evidenced by bruises to his lower abdomen, multiple rib fractures, and a corner bone fracture in one leg, stemming from at least two separate events, and that respondents were Parker's sole caretakers. We find no clear error in the trial court's determination that Parker was injured at the hands of at least one respondent, and was not protected from repeated injuries. Although the trial court was unable to determine which respondent, or both, actually inflicted the physical injuries, we do not find this deficiency fatal to the trial court's determination that termination was warranted under § 19b(3)(b). In either case, the evidence indicated that returning Parker to respondents' home would subject him to the same parental environment in which he sustained his injuries. Furthermore, the circumstantial evidence and reasonable inferences drawn from the evidence were sufficient to enable the trial court to find a reasonable likelihood, based on each respondent's conduct or capacity, that Parker would be harmed if returned to respondents' home. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Hence, the trial court did not clearly err in finding that § 19b(3)(j) was also proven by clear and convincing evidence. MCR 5.974(I); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

IV

Both respondents also challenge the trial court's decision to terminate their parental rights to their older son, Austin. We again note that the trial court's opinion reflects that it found that § 19b(3)(b) and § 19b(3)(j) were each proven with regard to Austin. In this regard, we disagree with respondents' claim that the trial court misapplied the doctrine of anticipatory neglect or abuse.

In general, the anticipatory neglect or abuse doctrine provides that how a parent treats one child is probative of how that parent may treat other children. *In re Powers*, 208 Mich App 582, 588-589; 528 NW2d 799 (1995); see also *In re AH*, 245 Mich App 77, 84; 627 NW2d 33

(2001) (addressing the anticipatory neglect doctrine as codified in MCL 722.638). Such evidence is not, however, conclusive or automatically determinative of this factual issue. *In re Kantola*, 139 Mich App 23, 28; 361 NW2d 20 (1984).

Although presumptions may be derived from permissible inferences, *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985), the doctrine of anticipatory neglect or abuse, is not a presumption at all. More importantly, the trial court's opinion does not reflect that it applied a presumption, irrebuttable or otherwise, in finding that the statutory grounds for termination were proven by clear and convincing evidence with respect to Austin. Further, although the trial court applied the evidentiary doctrine of anticipatory neglect or abuse, it expressly recognized that the doctrine did not *require* termination. On the basis of the evidence presented, however, it was reasonable for the trial court to employ this doctrine to infer that Austin, like Parker, would be at risk of harm in respondents' home if the conditions that contributed to Parker's injuries were to continue. We thus conclude that respondents' arguments on appeal provide no basis for disturbing the trial court's determination that the statutory grounds for termination were established with respect to Austin.

Affirmed.

/s/ Janet T. Neff
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello